> atable to Petitioners but it is not unconstitutional.

(Jacobs Aff., Ex. T at 12-13). Thus, as Subscribers must agree, cherry picking, at some point, affects the public interest, and thus the interests of local regulators become more important. However, the facts are not yet developed which would permit me to evaluate the competing interests implicated by the cherry harvest. In any event, there is no final agency action on the issue. In re Combustion Equip. Assocs., Inc., supra, 838 F.2d at 37-38 (quoting Gardner & Toilet Goods Assoc., supra, 387 U.S. at 171.

In looking at the "hardship to the parties" prong of the Abbott Laboratories test, just as with Liberty, it cannot be said if and in what way the Subscribers' First Amendment rights might be impaired by the City or the State defendants. As was discussed above in Point IA1b, the assertion that cable service will soon be cut off is unsupported. Merely asserting that Liberty's cable service to Sixty Sutton is going to be disrupted does not make it so. The Standstill Order is not a final determination in the matter. (Grow Aff. ¶ 32). Also, in at least one prior case in which the NYSCC issued an Order to Show Cause, a "Cease and Desist Order" was not issued for a year. Id. In addition, that operator was permitted to apply for a franchise,

which was granted, and there was no interruption in service. Id.[38] Balanced against this speculative hardship is the same significant hardship on NYSCC and DOITT as was discussed above with respect to Liberty -- premature judicial meddling in their processes. Accordingly, the Subscribers' First Amendment claims are dismissed as not ripe.

2. Due Process

The Subscribers' due process claims are jointly pleaded with Liberty's in the sixth and eighth claims in the Second Amended Complaint (¶¶ 89-90, 93-96). Since the City's notice of rulemaking has been issued and contemplates comment by interested parties such as the Subscribers, the Subscribers' due process claims are not yet ripe for the same reasons as Liberty's. See section IA2, supra.

II. Equal Protection

All three plaintiffs assert equal protection claims. They challenge 47 U.S.C. § 522(7), alleging that:

> The Common Ownership Requirement in 47 U.S.C. § 522(7)(B) discriminates between the Common

---

[38] The situation here can be distinguished from that in Patel and Patel v. City of South San Francisco, 606 F. Supp. 666 (N.D. Calif. 1985) when plaintiff operated a "adult hotel" in violation of the zoning ordinance, and part of plaintiff's activities involved the airing of "adult" programming in the motel rooms. Id. at 668-69. The plaintiff sought, inter alia, a declaration that the ordinance was unconstitutional. Id. at 669. The Court noted that the case was ripe for adjudication because it was "not disputed that the city will enforce the Ordinance against plaintiff" unless the Court prevented the enforcement. Id. The Court also noted that the city sought to enforce the Ordinance in the counterclaim in that very action. Id. It simply cannot be said with the same assurance here that the Subscribers face the loss of Liberty's cable service.

> Systems and Non-Common Systems in requiring a "franchise" only for the Non-Common Systems. . . This discrimination in 47 U.S.C. § 522(7)(B) violates equal protection principles of the due process clause of the Fifth Amendment to the United States Constitution . . . under the "strict scrutiny" standard because it adversely affects the fundamental right of Liberty to engage in a speech activity on private property using the Non-Common System at the Sutton Building.

(Second Amd. Compl. ¶¶ 83-84). (See also Second Amd. Compl. ¶ 88, 90).

A. Ripeness

Unlike the other claims raised by plaintiffs, their equal protection claims are ripe. As the Court of Appeals for the District of Columbia explained in Beach I:

> Unlike petitioners' First Amendment claim, the "rational basis" claim does not depend on particular circumstances. First, the standard for evaluating that claim does not vary with local conditions. . . . Second, the application of that standard is also context-invariant. . . . Thus, the rational-basis claim is "purely legal" for the purposes of Abbott Laboratories, and we reach the merits.

959 F.2d 975, 986 (D.C. Cir. 1992). The Court of Appeals then directed the FCC to consider within sixty days whether there was some "conceivable basis" for requiring the local franchising of external, quasi-private SMATV facilities but not for wholly private or internal facilities. Id. at 987. The fact that the Supreme Court addressed the merits of the Beach petitioners' equal protection claims in Beach III further indicates that plaintiffs' equal protection claims are ripe. 113 S. Ct. 2096

(1993). Accordingly, the motion to dismiss these claims on the grounds of ripeness is denied.

B. Abstention

Defendants have also moved to dismiss the complaint under various theories of abstention. The Supreme Court, however, has repeatedly emphasized that a federal court's obligation to adjudicate claims within its jurisdiction is "'virtually unflagging.'" New Orleans Public Service v. Council of the City of New Orleans, 491 U.S. 350, 359 (1989) (quoting Deakins v. Monaghan, 484 U.S. 193, 203 (1988)). Furthermore, "'the presence of a federal basis for jurisdiction,'" as in this case, "'may raise the level of justification needed for abstention.'" County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 13009 (2d Cir. 1990) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 n.21 (1976)). I also note that abstention "remains 'the exception, not the rule.'" New Orleans Public Service, 491 U.S. at 359 (quoting Colorado River, 424 U.S. at 813 (1976)). Indeed, the Court of Appeals has recently noted that a federal court would be remiss to abstain from resolving any constitutional challenge -- and certainly a constitutional challenge to a federal statute -- in the expectation that a state court might reach the issue. The Court explained that "[f]ederal courts do not need to wait for a state court's interpretation of federal constitutional law." Williams v. Lambert, No. 94-7290, 1995 WL 41434, at *6 (2d Cir. Feb. 1, 1995). In following these principles, I find that abstention with respect to plaintiffs'

equal protection challenge would be inappropriate. Accordingly, the motion to dismiss those claims on the grounds of abstention is denied.

C. Preliminary Injunction

Turning then to the Subscribers' motion for a preliminary injunction, the standard in this circuit for preliminary injunctive relief requires the moving party to demonstrate:

> (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

Liberty's claim challenging the distinction drawn between Common Systems and Non-Common Systems is precisely the claim rejected by the Supreme Court in Beach III. The Subscribers' claim is virtually identical in that First Amendment considerations are involved in both claims, but Liberty's are as "speaker" and (assuming that the Subscribers' rights are not derivative of Liberty's), the Subscribers' rights are as "recipients".

In Beach III, the Supreme Court addressed the question of whether there was any rational basis justifying the distinction between facilities serving separately owned and managed buildings and those serving one or more buildings under common ownership or management. 113 S.Ct. at 2099. The Court reversed

the decision of the Court of Appeals for the District of Columbia Circuit, which had held that this portion of the Cable Act was unconstitutional, id. at 2100-01, and upheld the constitutionality of the common-ownership distinction in the Cable Act under the rational basis test. Id. at 2103. In part because the Court of Appeals had not considered petitioners' argument that heightened scrutiny was appropriate, the Supreme Court did not reach that argument either. On remand from the Supreme Court, however, the District of Columbia Circuit found that "there is no basis for application of a heightened scrutiny standard" to the question of whether the common-ownership requirement violates Equal Protection. Beach IV, 10 F.2d 811 (D.C. Cir. 1993). Thus, the Beach cases effectively preclude the equal protection claims in the instant case.

In its reply memorandum, Liberty attempts to distinguish Beach III from the instant case. It writes:

> Both of the Circuit Court decisions and the Supreme Court decision in Beach were based on an equal protection analysis of the cross-ownership provisions of the Cable Act. There was never any consideration of the First Amendment burdens imposed by the challenged provisions.

(Liberty's Reply Mem. at 17). It is true that the Supreme Court's decision was limited to an equal protection analysis in Beach III. 113 S.Ct. at 2100 n. 3. However, the reason that the Supreme Court did not address the constitutionality of § 522(7) under the First Amendment was not, for example, because those claims had never been raised. The reason was, rather, that the

petitioners' First Amendment claims were found not yet ripe by the Court of Appeals. Id. As discussed supra, plaintiffs' First Amendment challenge here is, similarly, non-ripe.

Given the Beach Courts' holdings, supra, and Mr. MacNaughton's apparent admission that regulations designed to avoid cherry-picking "may be unpalatable . . . but . . . are not unconstitutional" (Jacobs Aff., Ex. T at 12-13), plaintiffs cannot demonstrate that they are entitled to a preliminary injunction. They show neither that they have a likelihood of success on the merits, nor that there are sufficiently serious questions going to the merits as to make them a fair ground for litigation. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., supra, 596 F.2d at 72. In addition, for the reasons discussed at Point IA1b, plaintiffs have not demonstrated irreparable harm or a balance of hardships tipping decidedly in their favor. Thus, plaintiffs' motion for a preliminary injunction on their equal protection claims is denied.

III. Plaintiffs' Remaining Claims

The remaining miscellaneous claims asserted by plaintiffs, i.e., the seventh, ninth, tenth, eleventh, and twelfth causes of action, are not ripe, particularly in light of the City's recently-published notice of proposed rulemaking. For example, in plaintiffs' seventh cause of action, they assert that Resolution 1639 is unreasonable pursuant to 47 U.S.C. § 541(a)(1) because it imposes terms and conditions more burdensome than those allowed by 47 U.S.C. § 521 et seq. and by New York state law. However, Resolution 1639 does not impose any terms and conditions directly upon Liberty. See Resolution 1639. It is, rather, the terms of whatever franchise, if any, that is issued by DOITT which will establish what burdens Liberty may face. Since a franchise has not yet been issued but the notice of rulemaking has been published, it is premature to consider this claim for the reasons set forth above.

Similarly, plaintiffs' ninth claim, that DOITT has violated 47 U.S.C. § 541(a) by refusing to grant Liberty a franchise, is also not yet ripe; DOITT has not so refused.

Plaintiffs' tenth claim asserts that the defendants have made a "final determination denying Liberty" a franchise. (Second Amd. Compl. ¶ 101). Clearly that is not the case, and thus it is not yet appropriate to address this claim.

Plaintiffs' eleventh claim for relief, that 47 U.S.C. § 521 et seq. and FCC decisions have preempted the regulatory authority of the City over the provision of "premium" cable

ripeness and abstention are denied, and plaintiffs' motion for a preliminary injunction is denied.

Dated: New York, New York
March 13, 1995

LORETTA A. PRESKA, U.S.D.J.